IN THE

Supreme Court of the United States

NO. 81

OCTOBER TERM, 1961

THOMAS N. GRIGGS, Petitioner

v.

COUNTY OF ALLEGHENY

On Writ of Certiorari to the Supreme Court of Pennsylvania

PETITIONER'S REPLY BRIEF

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May it Please the Court:

Pursuant to Rule 24 (4) of your Honorable Court, Petitioner, Thomas N. Griggs, submits his Reply Brief to the Briefs for the County of Allegheny, Respondent; the Airport Operators Council (amicus curiae); and the Port of Seattle (amicus curiae).

The principal arguments advanced in opposition are (1) this Court should not consider the merits of the petition because the Petitioner is first required to exhaust state and federal remedies; (2) an immunity from all liability exists by reason of the federal statutes and regulations; and (3) the Causby case is inapplicable to the facts in Petitioner's case. While we believe they have presented nothing which is detrimental to our position, we shall reply briefly to each of the matters in the foregoing order.

I.

Petitioner Is Not Required to Exhaust State and Federal Remedies

It is contended that the Petitioner, before the constitutional question can be resolved, is obligated to pursue the remedy suggested by the Supreme Court of Pennsylvania and/or apply for relief to the appropriate federal agency from the burden of the low flights over his property.

There would be some merit to this contention, (1) if the Petitioner's property were located elsewhere than on a glide path and there were frequent flights over it below the safe navigable airspace which were not necessary for landing or taking off at the airport; or, (2) if the Commonwealth of Pennsylvania had exclusive jurisdiction and control over the airspace in Pennsylvania and the low flights were in violation of Pennsylvania regulations. But neither is the fact; (1) the Petitioner's property is on a glide path which must be used for access to the airport, and (2) the federal government has exclusive jurisdiction and control over the airspace in the United States.

The assumed reliance upon the contended for application of the doctrines of exhaustion of available state and federal remedies, and the avoidance of untimely and premature resolution of constitutional questions pending exhaustion of these remedies, as precluding review of this petition on its merits, is misplaced in this case.

The Fourteenth Amendment imposes a constitutional limitation upon state actions; and specifically, the prohibition contained in the Fifth Amendment, as spelled out in the decisional law, requiring the federal govern-

ment to pay just compensation for the taking of private property for public use, is grafted into the property due process concepts of the Fourteenth Amendment. *Panhandle Eastern Pipe Line Co. v. State Highway Comm. of Kansas,* 294 U.S. 613.

The fundamental right guaranteed by the Fourteenth Amendment is that the owner shall not be deprived by the state of the market value of his property under a rule of law which makes it impossible for him to obtain just compensation. *McCoy v. Union Elevated R. Co.,* 247 U.S. 354. The nature of this fundamental right was characterized in *Gibbes v. Zimmerman,* 290 U.S. 326, wherein it was stated at p. 332:

> ". . . the appellant has no property in the constitutional sense in any particular form of remedy; all that is guaranteed by the Fourteenth Amendment is the preservation of his substantial *right to redress by some effective procedure.*" (Emphasis added).

Some reliance is placed upon *Dohany v. Rogers,* 281 U.S. 362, and the Petitioner is in agreement with the quotations as found in the Airport Operators' brief to the extent that they are read in the context of an admitted taking of private property by the state.

In the instant case the Supreme Court of Pennsylvania has held that one of the political subdivisions of the state, Allegheny County, did not take Petitioner's property, and suggests that the aggrieved property owner seek relief by prosecuting trespass actions against the individual airlines. The correctness of this decision is here challenged by the Petitioner as being in conflict with the prohibitions on state action contained in the

Fourteenth Amendment property due process clause as given meaning by the Fifth Amendment and specifically the Causby decision.

The principal issue here raised is simple and narrow —was there state action, taking Petitioner's private property for a public use, within the meaning of the Fourteenth Amendment. The thrust of the exhaustion of remedies contention is, that in order to determine if there is prohibited state action, it is necessary first to prosecute individual civil trespass actions for each individual trespass, against each transgressing airline, in order to obtain "standing" to raise this violation of the Fourteenth Amendment.

The instant case is analogous to a situation where a municipality erects a public library or other public building on land near but not abutting on a public highway and the municipality has constructed a roadway leading therefrom to the public building on private land which it has not acquired by purchase or condemnation. Must the aggrieved property owners commence trespass actions against the bus lines and other public conveyances, (which do not have the power of eminent domain but hold certificates of public convenience and necessity), which transport the public to and from the public building in order thereafter to raise the question of whether there has been a taking of the private property by the municipality which does have the power of eminent domain? No cases have been cited which even suggest this most unusual contended for application of the doctrine of exhaustion of available remedies and we believe there are none.

It is equally violative of the Fourteenth Amendment, positing a taking, for the state to deny a substantial

right to redress by some effective procedure, *Gibbes v. Zimmerman,* supra. It is interesting to observe the nature of the substantial right to redress, the exhaustion of which, the Respondent asserts, is necessary, in order to argue the merits of this petition. A discussion of this suggested remedy is found in Petitioner's brief, Argument II, and what is said there regarding the futility of private trespass actions against quasi-public carriers operating pursuant to Air Carrier Operating Certificates and federal regulations is highlighted in the *City of Newark, New Jersey, et al. v. Eastern Airlines, Inc. et al.,* 159 F. Supp. 750, a decision relied upon by the Respondent, wherein it is stated at page 760:

> "There is no evidence that the planes which passed over the school were those of any one or more of the defendants. * * * There is no evidence which will support a determination that the frequent invasions were by the planes owned by any one or more of the defendants, a determination of fact essential to an adjudication that any one or more of the defendants was, or were, guilty of a trespass. The adjudication cannot rest on mere conjecture or speculation."

The short answer, in addition to what has been previously stated, to the contention that the doctrine of exhaustion of remedies requires seeking relief at the federal level, as was held in the *City of Newark* case is, aside from the fact that that case did not basically present a glide angle type of invasion, that no amount of regulatory change short of an absolute ban on the use of this, one of the three runways, would be adequate or effective.

II.

There Is No Immunity Under Federal Statutes and Regulations

The argument is advanced that the flights of the aircraft are within the navigable airspace as defined by the federal statutes and regulations and are an exercise of the declared right of travel in airspace. That means, as is so blandly insisted by the Port Authority of Seattle, that the landowner is not entitled to receive just compensation for the taking of the airspace over his property, which he must have for his use and enjoyment of it, insofar as such taking is the result of authorized and necessary flights to accomplish a public purpose. That amounts to confiscation and we believe contravenes all concepts of the Fifth and Fourteenth Amendments to the Constitution of the United States as well as similar provisions in state constitutions.

Mr. Justice Holmes said in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, at pp. 415-416:

> "The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. Hairston v. Danville & Western Ry. Co., 208 U.S. 598, 605. * * *
>
> "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. * * * We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter

cut than the constitutional way of paying for the change. * * *"

Again, in *Armstrong v. United States*, 364 U.S. 40, this Court said at page 48:

> "The Fifth Amendment's guarantee that private property shall not be taken for pubic use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. * * *"

This same argument was advanced by the Government in the Causby case and definitely rejected by this Court. The several federal District Courts and the Court of Claims in the cases before them which involved glide path invasions have all rejected the contention and have uniformly followed Causby in awarding compensation for the "taking" of airspace for the flight over glide paths by government planes. The Supreme Court of Pennsylvania in this case decided this contention adversely to the Respondent, and the Supreme Court of Washington in *Ackerman v. Port of Seattle*, 349 P. 2d 664, in a lengthy and most thorough discussion likewise applied the doctrine of the Causby case and denied the Port Authority's effort to resist its effect.

The Respondent and amici curiae contend that the inclusion in the Federal Aviation Act of 1958, 49 U.S.C.A. §1301, subparagraph 24, affirms their position of immunity.[1]

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1. 'Navigable airsapce' means airspace above the minimum altitudes of flight prescribed by regulations issued under this Act, and shall include airspace needed to insure safety in take-off and landing of aircraft. 72 Stat. 739.

Mr. Justice Reed (Retired), sitting by designation in the Court of Claims, in the case of *Matson v. United States,* 171 F. Supp. 283, (1959), in awarding compensation for a taking, laid that argument to rest in the following language at pp. 285-286:

> "In the Causby case, the path of glide was held not to be in the 'navigable airspace which Congress placed within the public domain,' at pages 263-266, of 328 U.S. at pages 1067 of 66 S. Ct. This conclusion was reached, although the then authorized regulation in use had a height exception for take-off and landing. And the Court determined:
>
> > 'We think that the landowner, as an incident to his ownership, has a claim to it and that invasions of it are in the same category as invasions of the surface.' At p. 265 of 328 U.S. at page 1068 of 66 S. Ct.
>
> "Today there is a different statute. We do not think, however, that the change in the definition of navigable airspace affects plaintiffs' causes of action. The Government's easement over plaintiffs' property may be perpetual. Although today navigable airspace with its public right of transit, 72 Stat. 740 §104, includes the glide, its use by the United States or other aeroplane operators at heights below the minimum altitudes of flight except where necessary for take-off or landing, may require compensation. The reasoning of the Causby case leads to this conclusion. It was there said:
>
> > 'The superadjacent airspace at this low altitude is so close to the land that continuous invasions of it affect the use of the surface of

> the land itself.' At p. 265 of 328 U.S. at page 1068 at 66 S. Ct."

And in *United States v. 15,909 Acres, et al.*, 176 F. Supp. 447, Judge Yankwich, Chief Judge of the U. S. District Court (Southern District, California), made this pertinent observation with regard to that principle:

> ". . . Regardless of any congressional limitations, the land owner, as an incident to his ownership, has a claim to the superadjacent airspace at such altitude as interferes with his enjoyment of the property and 'that invasions of it are in the same category as invasions of the surface.' United States v. Causby, 1946, 328 U.S. 256, 265, 66 S. Ct. 1062, 1068, 90 L.Ed. 1206."

III.

The Causby Doctrine Applies

The public use made of the airspace above and in close proximity to Petitioner's property situate in the path of glide imposes a servitude on Petitioner's property and results in a taking of the airspace. Liability for this taking rests entirely on the Respondent under the principles of the Causby case because the unavoidable public use of the airspace is made necessary to effect the public purpose for which the airport site was originally condemned and is presently maintained by the County. The contention that the Causby case does not fix liability on the airport operator ignores the principle that liability attaches as a result of public appropriation of private property in furtherance of a public need or purpose. (This principle is fully discussed on pages 18 to 21, inclusive, of our main brief with applicable citations.)

In this case, public use is being made of the airspace to the same extent that the airspace in the Causby case was employed in the war effort. The public use here is for the operation of public air transportation facilities pursuant to the declared policy of the federal government to promote and encourage air commerce and the development of civil aeronautics. The character of the public use is the same in both cases and the fact that it is more readily discernible in the Causby case is a distinction without a difference. The several reasons advanced to minimize and limit the weight to be accorded to the Causby decision are deemed without merit and will not be discussed.

There was a taking by the Respondent on June 1, 1952.[2]

Respectfully submitted,

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2. Respondent questions the date of taking, namely, June 1, 1952. The Commissioners of Allegheny County on May 27, 1952, passed a resolution which provided for the opening of the airport for public use as of 12:01 a.m. June 1, 1952. Begining on that date the airspace of the Petitioner became subject to be used for access to the Greater Pittsburgh Airport. The act of condemnation (in this case the resolution) in an eminent domain proceeding by a public body is that event to which "the taking" within the meaning of Article XVI, paragraph 8 of the Pennsylvania Constitution relates back after there has been an actual physical entry. *Lakewood Memorial Gardens, Inc. Appeal,* 381 Pa. 46, and cases therein cited.

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SUPPLEMENTAL CITATIONS TO PETITIONER'S BRIEF AND REPLY BRIEF

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MAY IT PLEASE THE COURT:

Pursuant to Rule 41 (5) of your Honorable Court, Petitioner, Thomas N. Griggs, submits the following additional citations as a supplement to those found in his brief in chief and in his reply brief. The first citation was available to the petitioner prior to the filing of his brief in chief, but was not therein included, whereas the latter two citations are late citations which were unavailable to petitioner at the time of filing his brief in chief or his reply brief. Petitioner hereby requests leave of this Honorable Court to file these supplemental citations for consideration on the merits in this case. Examination of the following citations reveals that each supports

petitioner's contention that the Pennsylvania Supreme Court erred in its decision in this case.

Recent Decisions, 22 University of Pittsburgh Law Review 786 (1961);

Note, *Griggs v. Allegheny County: Avigation Easements and Eminent Domain Proceedings.* 66 Dickinson Law Review 107 (1961);

Comments, 60 Michigan Law Review 98 (1961).

Respectfully submitted,

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